No. 16,060

United States Court of Appeals
For the Ninth Circuit

FRED JAY RUDMANN, doing business as Constructors of Hawaii,

Appellant,

vs.

ALFRED E. LINCZER, Trustee in Bankruptcy of the Estate of Fred Jay Rudmann, doing business as Constructors of Hawaii,

Appellee.

Appeal from the United States District Court for the Territory of Hawaii.

BRIEF FOR APPELLANT.

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JURISDICTION.

On August 6, 1956, Fred Jay Rudmann, Appellant, was adjudicated a voluntary bankrupt by the United States District Court of Hawaii as a Court of bankruptcy under the provisions of Title 11 U.S.C. Section 11. The case was duly referred to the Referee in Bankruptcy of said Court who took jurisdiction pursuant to the powers vested in him by Title 11 U.S.C.

Section 66. The bankrupt in Schedules B-1 and B-5 of his Petition in Bankruptcy, described certain real property held by the bankrupt and his wife "as joint tenants with full rights of survivorship and not as tenants in common" and claimed that said property did not constitute an asset of the bankrupt estate. The trustee in bankruptcy filed with the Referee the trustee's determination that said property was not an asset of the bankrupt estate and that said property was not subject to the jurisdiction of the bankruptcy Court (Record p. 4-8). A creditor objected to the trustee's determination of the status of the real property (Record p. 8). Thereafter, a hearing by the Referee was had upon the said objection of the creditor and the Referee on May 31, 1957 sustained the objection of the creditor and held that the said real property was held by the trustee as tenant in common with the bankrupt's wife and that the bankrupt could not exclude said property from the assets of his estate (Record p. 9). Thereafter and on June 7, 1957 the bankrupt, appellant herein, within the time provided by law and under the authority of Section 39 (c) of the Bankruptcy Act filed a Petition for Review by a Judge of the District Court of Hawaii (Record p. 10). The Referee's Certificate was thereafter filed on June 25, 1957 in the office of the clerk of the United States District Court. On February 10, 1958, after a hearing on the Petition for Review, the Judge of the United States District Court confirmed the Order of the Referee including the said real property as an asset of the bankrupt estate and dismissed

the Petition for Review. Notice of Appeal from this final order of the United States District Judge was taken to this Court within the time provided by law on March 21, 1958.

The jurisdiction of this Court is founded on Title 11 U.S.C. Section 47.

STATEMENT OF FACTS.

The facts are simple and are not disputed (Record p. 13). On August 6, 1956 Fred Jay Rudmann was adjudicated a voluntary bankrupt. His wife, Mae Rudmann, was not a party to the bankruptcy proceeding. In March, 1945, more than eleven years prior to the time that appellant, Fred Jay Rudmann, was adjudicated a bankrupt, the appellant and his wife acquired certain real property used by them as their home and residence. The deed by which they acquired this real property conveyed the property to Fred Jay Rudmann and Mae Rudmann, husband and wife, "as joint tenants with full right of survivorship, and not as tenants in common, their assigns, and the heirs and assigns of the survivor of them" (Record p. 13-17). The bankrupt claimed in his bankruptcy schedules that this real property was not an asset of the bankrupt estate. The trustee in bankruptcy in his report to the Referee dated September 15, 1956 (Record p. 4) took the position that said real property was not an asset of the bankrupt estate. Upon objection by a creditor to the said report of the trustee the Referee ruled that said real property was in-

cludible as an asset of the bankrupt estate (Record p. 9). Following a hearing on a Petition for Review of the Referee's Order the Judge of the District Court sustained the Order of the Referee. That Order of the District Judge is now before this Court on Appeal.

QUESTIONS INVOLVED.

1. Did the District Court in Bankruptcy err in ruling that the real property of the bankrupt and his wife was includible as an asset of the bankrupt estate?

2. Is real property held prior to bankruptcy by husband and wife in Hawaii as "joint tenants with full right of survivorship, and not as tenants in common, their assigns, and the heirs and assigns of the survivor of them" includible in the assets of the bankrupt husband's estate?

SPECIFICATIONS OF ERROR.

1. That the Court of Bankruptcy (Judge of the United States District Court) erred in confirming the Order of the Referee and dismissing the bankrupt's Petition for Review of the Referee's Order dated May 31, 1957.

2. That the Court of Bankruptcy (Judge of the United States District Court) erred in holding as a matter of law that in Hawaii real property held prior to bankruptcy by husband and wife as "joint tenants

with full rights of survivorship and not as tenants in common, their assigns, and the heirs and assigns of the survivor of them" is includible in the assets of the bankrupt husband's estate, and that the trustee in bankruptcy now holds said property as a tenant in common with the bankrupt's wife.

SUMMARY OF ARGUMENT.

The facts are not in dispute. The sole issue is the legal effect in Hawaii of a conveyance of real property to husband and wife as "joint tenants with full rights of survivorship". Appellant maintains that in accordance with the rule at common law a joint tenancy between husband and wife is a tenancy by the entirety, that property held by the entireties is not subject to either the debts of the husband or the wife and therefore does not become a part of the assets of a husband's bankrupt estate. Since the real property in this case was held by husband and wife as tenants by the entirety, even though called a joint tenancy, the property was not part of the bankrupt estate of the husband and Court erred in ruling that it was a part of the bankrupt husband's estate.

ARGUMENT.

1. A CONVEYANCE OF REAL PROPERTY IN HAWAII IN 1945 TO HUSBAND AND WIFE "AS JOINT TENANTS WITH FULL RIGHTS OF SUVIVORSHIP, AND NOT AS TENANTS IN COMMON, THEIR ASSIGNS AND THE HEIRS AND ASSIGNS OF THE SURVIVOR OF THEM" VESTED IN THEM AN ESTATE BY THE ENTIRETY.

At common law the same words of conveyance which would make other grantees joint tenants will make a husband and wife tenants by the entireties. 26 Am. Jur. 696, Note 12. The common law of England as ascertained by English and American decisions is the common law of Hawaii. Sec. 1-1 R.L. Hawaii 1955.

It appears well settled in Hawaii that prior to 1945 and up to the present time tenancy by the entirety has existed as a legal and recognized estate in property.

Sec. 345-1 R.L. Hawaii, 1955 provides as follows:

> "All grants, conveyances and devises of land, or of any interest therein, made to two or more persons, shall be construed to create estates in common and not in joint-tenancy or *by entirety,* unless it manifestly appears from the tenor of the instrument that it was intended to create an estate in joint-tenancy or by entirety; provided, that the foregoing provisions shall not apply to grants, conveyances or devises to executors or trustees." (Emphasis added.)

Sec. 345-2 R.L. Hawaii, 1955 provides as follows:

> "Land, or any interest therein, or any other type of property or property rights or interests or interest therein, may be conveyed by a person to himself and another, or others, as joint tenants,

> or *to himself and his spouse as tenants by the entirety,* or by tenants in common to themselves or themselves and others as joint tenants, without the necessity of conveying through a third party, and each such instrument shall be construed as validly creating a joint tenancy or a tenancy by the entirety, as the case may be, if the tenor of the instrument manifestly indicates an intent to create such tenancy." (Emphasis added.)

It appears to be well established case law in Hawaii that property granted to a husband and wife vests in them an estate by the entirety. *Paahana v. Bila,* 3 Haw. 725 (1876); *Kenway v. Notely,* 5 Haw. 123; *Wailehua v. Lio,* 5 Haw. 519 (1886); *Kuanalewa v. Kipi,* 7 Haw. 575 (1889); *Robinson v. Aheong,* 13 Haw. 196 (1900). There are no Hawaiian cases construing the legal effect of the exact words used in the case at bar.

In the *Paahana* case, supra, which involved a grant to a husband and to his wife, the Court said:

> "They are not properly joint tenants of such lands, since, though there is a right of survivorship neither can convey so as to defeat this right in the other. Each takes an entirety of the estate."

In the *Robinson* case, there was a device by will to Kaahinu and to two granchildren, the two grandchildren happening to be husband and wife. As to the interest of the two grandchildren, Kaahinu having predeceased the testator, the Court stated:

> "It is agreed that these (the two grandchildren) being husband and wife, took neither as

tenants in common, nor as joint tenants, but by the entirety."

A conveyance to husband and wife as joint tenants has been held in other jurisdictions to create a tenancy by the entireties.

Settle v. Settle, 56 App. D.C. 50, 8 F. 2d 911, 43 A.L.R. 1079.

Commissioner of Internal Revenue v. Hart, 76 F. 2d 864, declaring Michigan law and following *Hoyt v. Winstanley,* 221 Mich. 515, 191 N.W. 213;

Heath v. Heath, 189 F. 2d 697 declaring District of Columbia law and following *Settle v. Settle,* 56 App. D.C. 50, 8 F. 2d 911, 43 A.L.R. 1079;

Laun v. De Pasqualte, 254 Ky. 314, 71 S.W. 2d 641;

Hoag v. Hoag, 213 Mass. 50, 99 N.E. 521, Ann. Cas. 1913 E, 886;

Childs v. Childs, 293 Mass. 67, 199 N.E. 383, referring to a tenancy by entireties as a modified form of joint tenancy;

Jurewicz v. Jurewicz, 317 Mass. 512, 58 N.E. 2d 832;

Pineo v. White, 320 Mass. 487, 70 N.E. 2d 294;

Cummings v. Wadja, 325 Mass. 242, 90 N.E. 2d 337;

Hoyt v. Winstanley, 221 Mich. 515, 191 N.W. 213.

In *Settle v. Settle,* supra, a leading case, a conveyance of land to husband and wife as *joint tenants*

was held to create a *tenancy by the entirety.* This result was reached *despite the enactment of the Married Woman's Act* in the District of Columbia.

That Court it is submitted, correctly summarized the law as follows:

> "We agree with the decision of the lower court. In our opinion, under such conveyances, husband and wife take as tenants by the entirety at common law, and this rule still prevails in the District of Columbia. 'Undoubtedly, at common law, husband and wife did not take, under a conveyance of land to them jointly, as tenants in common or as joint tenants but each became seized of the entirety, per tout, et non per my, the consequence of which was that neither could dispose of any part without the assent of the other, but the whole remained to the survivor under the original grant.' . . .
>
> "The tenancy by entireties is essentially a joint tenancy, modified by the common-law theory that husband and wife are one person. 1 Tiffany Real Property § 194. *One of the principal common-law rules of construction in relation to such tenancy is that the same words of conveyance which would make other grantees joint tenants will make husband and wife tenants by entireties. . . . Hence, at common law, under a conveyance to husband and wife as 'joint tenants, they do not take as simple joint tenants, but as tenants by entireties. . . .'* (Emphasis added.)
>
> "It is plain that, if the common-law doctrine of tenancy by entireties, as above defined, prevails in the District of Columbia, the appellant is not entitled to a partition of these lands. It cannot be disputed that this doctrine was im-

ported into the early common law of the District, but it has been contended that it was first modified by the Married Woman's Act, and afterwards abolished by § 1031 of the District Code.

"In Loughran v. Lemmon, 19 App. D.C. 141, 147, this court said: 'There is nothing in the Married Woman's Act, in force in this District, that in any way defeats or destroys the common-law estate by entireties, as that estate subsists between husband and wife by purchase. The estate exists as at the common law, unaffected by statute.'

"Subsequently to the decision just cited Congress enacted § 1031 of the District Code, reading as follows:

'Sec. 1031. Tenancies in Common and Joint Tenancies. Every estate granted or devised to two or more persons in their own right, including estates granted or devised to husband and wife, shall be a tenancy in common, unless expressly declared to be a joint tenancy; but every estate vested in executors or trustees, as such, shall be a joint tenancy, unless otherwise expressed.'

"This enactment was in force in the District at the date of the conveyances now in question, and it is contended that it effectually abolished tenancy by entireties within the District of Columbia. We cannot agree with this contention. The section does no more than provide that express terms are necessary in order to create a joint tenancy rather than a tenancy in common, whether in conveyances to strangers or to husband and wife, *but it makes no attempt to define or change the incidents or effect of either of these kinds of tenancy.* Consequently such tenancies, when created consistently with the requirements

of the section have the same effect as before its enactment. If Congress had intended to abolish tenancies by entireties in the District, it is safe to assume that the intention would have been expressed in more specific terms than those used in § 1031, especially in view of the repeated decisions of the courts of the District upon the subject."

The annotator in 43 A.L.R. sums up the case law on page 1082 as follows:

> "The decisions in the jurisdictions wherein tenancy by entireties is still recognized are practically unanimous to the effect that a statute providing generally that a devise or conveyance to two or more shall presumptively create a tenancy in common, and not a joint tenancy, have no application to a devise or conveyance to husband and wife, and that such a devise or conveyance creates a tenancy by entireties as at common law."

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2. WHERE HUSBAND AND WIFE HOLD REAL PROPERTY AS TENANTS BY THE ENTIRETY, NO INTEREST IS SUBJECT TO LEVY AND EXECUTION AND NO INTERST THEREIN IS VESTED BY OPERATION OF LAW IN THE TRUSTEE IN BANKRUPTCY UNDER TITLE 11 U.S.C. SEC. 110 (a) (5).

It is well settled that no portion of an estate by entireties passes to the trustee in bankruptcy of either of the spouses as an asset of the bankrupt.

6 Am. Jur. p. 599, Sec. 154;

See annotation 47 A.L.R. 437;

In re Utz, (D.C. Md. 1934) 7 Fed. Supp. 612, 26 A.B.R. (N.S.) 101;

Culton v. Kearns, (C.C.A. 4th 1925) 8 Fed. 2d 437.

This point did not appear to be disputed by the objecting creditor in his memoranda of law presented to the referee nor by the referee in his decision. (Note: These documents are not included in the record but mention is herein made to obviate the present necessity of further argument on this point.)

CONCLUSION.

Since under Hawaiian law the bankrupt and his wife held the real property as tenants by the entireties neither could alienate nor encumber the property alone without the agreement by the other. No interest in the property therefore is vested by law in the trustee in bankruptcy under Sec. 70 (a) (5) of the Bankruptcy Act. The Order of the District Court Judge confirming the Order of the Referee Sustaining the Creditor's objection should be reversed and set aside.

Dated, Honolulu, Hawaii,
September 10, 1958.

Respectfully submitted,
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Attorney for Appellant.